ESTATE OF HIEMSTENNIE (MAGGIE) WHIZ ABBOTT

IBIA 75-30 Decided April 17, 1975

(See also IBIA 73-3)

Appeal from an Order affirming will and decree of distribution.

Affirmed

1. Indian Probate: Hearing: Full & Complete

   A full and complete hearing is had on proof of a will when all parties are afforded an opportunity to present evidence and to cross-examine witnesses.

2. Indian Probate: State Law: Applicability to Indian Probate, Testate

Compliance with state laws setting forth requirements for the execution of wills is not required in the execution of Indian wills disposing of trust or restricted property.

3. Indian Probate: Wills: Witnesses, Attesting

An attesting witness is disqualified from acting in an attesting capacity only if his interest in the will is of a fixed, certain, and vested pecuniary character, or one which otherwise gives him a direct and immediate beneficial right under the will.

4. Indian Probate: Wills: Witnesses, Attesting--Indian Probate: Wills: Publication

There is no requirement in the regulations or elsewhere that the attesting witnesses be present at the same time, or sign in the presence of the testatrix, or that the testatrix acknowledge her subscription to the will to the witnesses, or that she "publish" said instrument by declaring it to be her last will.

5. Indian Probate: Witnesses: Observation By Administrative Law Judge

Where testimony is conflicting, the factual findings of the Administrative Law Judge will not be disturbed because he had the opportunity to observe and hear the witnesses.

6. Indian Probate: Wills: Undue Influence: Failure to Establish, Generally

To invalidate an Indian will because of undue influence, it must be shown: (1) that the decedent was susceptible to being dominated by another; (2) that the

> person allegedly influencing the decedent in the execution of the will was capable of controlling his mind and actions; (3) that such person, at the time of the testamentary act, did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires.

APPEARANCES: James H. Phelps, Esq., for appellant, Doris Imogene Whiz Burkybile; Owen M. Panner, Esq., of Panner, Johnson, Marceau and Karnopp, for appellees.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

The above-entitled case was remanded for rehearing because appellees were not afforded full opportunity to be heard.

The matter was heard by Administrative Law Judge Robert C. Snashall at Warm Springs, Oregon, on May 31, 1974.

Based upon the evidence presented at the hearing, the Judge found, inter alia, that the decedent, Hiemstennie (Maggie) Whiz Abbott died testate on April 4, 1970, leaving surviving as her sole heir at law, a granddaughter, Doris Imogene Whiz Burkybile. He further found that said decedent left a last will and testament dated March 2, 1970, wherein she devised her entire estate to Ramona Whiz Smith, as her sole devisee, with the exception of a one-dollar bequest to Doris Imogene Whiz Burkybile.

The Judge further found that although said will was drafted by a minor child of the devisee and witnessed by only members, or soon-to-be members, of the immediate family of the devisee, the preponderance of the evidence disclosed that said will was drafted and executed in all respects substantially in accordance with applicable law and was done at a time when the decedent was of sound and disposing mind and in full control of her faculties.

Upon the issuance of the order affirming the will and decree of distribution, Doris Imogene Burkybile petitioned for rehearing. The petition was denied and the petitioner appealed to this Board.

Essentially, the basis for rehearing and appeal are identical. The contentions are as follows:

(1) The hearing should have been held on the Yakima Reservation for the reason that Doris Whiz Burkybile had witnesses located in that area who would testify that undue influence was used on the decedent in obtaining the execution of the will.

(2) That Nora Speedis, Toppenish, Washington, a niece of the decedent, could not appear at the Warm Springs hearing on May 31, 1974, because of the distance between Warm Springs and Toppenish.

(3) The evidence fails to show that the will was made and executed in the manner required by law.

(4) The will should not have been admitted as evidence, because the witnesses gave conflicting evidence as to the manner of execution.

(5) The evidence is insufficient to support the findings and the Order of August 5, 1974, and on the contrary, shows that the purported will was obtained by undue influence and therefore is null and void.

(6) The decision is arbitrary and capricious and not supported by the evidence.

We cannot agree with the appellant's first and second contentions.

[1] A full and complete hearing is had on proof of a will when all parties are afforded an opportunity to present evidence and to cross-examine witnesses. Estate of Charlotte Davis Kanine, IA-828 (January 8, 1959). [Same case as IA-828 (Supp.), 72 I.D. 58 (1965).]

The record clearly shows that all parties, appellant and appellees alike, were ably represented at the hearing by counsel.

At no time preliminary to the taking of testimony did the appellant or her attorney offer the slightest objection to the hearing being held at Warm Springs. Moreover, appellant and her attorney were afforded still another opportunity to ask for continuance to Yakima or Toppenish, for whatever the reason, when counsel for appellees in his closing argument, referring to the admissibility of the affidavit of Marie Kanim George, stated at page 330 of the transcript:

> * * * If there's any question concerning the admissibility of this affidavit of Marie Kanim George as I indicated I would ask for a continuation of this to have the testimony of Marie Kanim George and if counsel for the protestants wishes it I'm still willing to recess this until we can go to reset this hearing for Yakima, take the testimony of Marie Kanim George, if there's any question about it. I want the record to show that offer. * * *

No response was made by the appellant or her attorney to this offer. Instead, they chose to remain silent. The appellant cannot now say that the hearing should have been held at Yakima. She cannot now argue that Nora Speedis could not appear because of the distance between Warm Springs and Toppenish. Moreover,

pursuant to the rules promulgated by the Department, ample opportunity was afforded appellant to take the deposition of any witness who was unable to appear at Warm Springs. See 43 CFR 4.232(b).

Because the decedent lived continuously at Warm Springs during the last six or seven years of her life, except for one short interruption, it is reasonable to conclude the hearing would be held at a place convenient to those persons who were familiar with the decedent then, and also at the time of the making of the will.

Turning to contentions three and four, it appears that these contentions were based upon requirements usually found in state laws.

[2] It is well established that compliance with the requirements of state laws in the execution of Indian wills is not required. Blanset v. Cardin, 256 U.S. 319 (1921); Estate of Annie Devereaux Howard, IA-884 (December 17, 1959):

> Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust * * * shall have the right prior to the expiration of the trust or restrictive period * * * to dispose of such property by will, in accordance with regulations prescribed by the Secretary of the Interior * * * 25 U.S.C. § 373 (1964).

The pertinent regulation simply provides that an Indian of the age of 21 years and of testamentary capacity, who has any right, title, or interest in trust or restricted property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses. See 43 CFR 4.260(a).

[3] An attesting witness is disqualified from acting in an attesting capacity only if his interest in the will is of a fixed, certain, and vested pecuniary character or one which otherwise gives him a direct and immediate beneficial right under the will. Estate of Matilda Levi, A-24653 (November 3, 1947).

In the case at bar, the decedent affixed her thumbprint and the will was attested by three witnesses. There appears to be a conflict as to whether the attesting witnesses were present at the same time; whether they signed in the presence of the testatrix, or that the testatrix acknowledged her subscription to the will to the attesting witnesses; or that she "publish" said instrument by declaring it to be her last will.

[4] There is no requirement in the regulations or elsewhere that the attesting witnesses be present at the same time, or sign in the presence of the testatrix, or that the testatrix acknowledge her subscription to the will to the witnesses, or that she "publish" said instrument by declaring it to be her last will. Estate of William Cecil Robedeaux, 1 IBIA 106, 78 I.D. 234 (1971).

It is a rule of general application that, in the absence of a statute requiring it, publication is unnecessary. 94 C.J.S. Wills § 187 (1956).

[5] Where testimony is conflicting, the factual findings of the Administrative Law Judge will not be disturbed because he had the opportunity to observe and hear the witnesses. Estate of Ammon Pubigee, IA-859 (April 7, 1966).

We conclude from a review of the entire record that the execution of the will was proper in all respects and completely in accordance with applicable regulations.

The appellant further contends that the evidence is insufficient to support the findings and the Order of August 5, 1974, and on the contrary shows that the purported will was obtained by undue influence.

[6] To invalidate a will because of undue influence upon a testatrix, it must be shown: (1) that she was susceptible of being dominated by another; (2) that the person allegedly influencing her in the execution of the will was capable of controlling her mind and actions; (3) that such person did exert influence upon the decedent of a nature calculated to induce or coerce her to make a will contrary to the decedent's own desires. Estate of Louis B. Fronkier, IA-T-24 (Feb. 24, 1970). If any one of these elements of proof is missing, an allegation of undue influence cannot be established merely by showing that an opportunity existed for it to be exerted. Estate of Joe (Joseph) Sherwood, IA-P-10 (May 9, 1968).

The evidence adduced at the hearing establishes the decedent had previously been an excessive drinker. However, when she freely moved to Warm Springs to live with Ramona Whiz Smith, the evidence shows that she drank on occasions but only in moderation. The evidence clearly establishes that the decedent was active, fully cognizant of the world around her, of what she was doing, that she had a mind of her own, and that she had the objects of her bounty in mind. There is no evidence in the record showing any indication of undue influence.

Appellant's contention that the evidence is insufficient to support the findings and the Order of August 5, 1974, and that the will was the result of undue influence is clearly not substantiated by the evidence.

Suffice it to say that the sixth contention, namely, that the decision is arbitrary and capricious and not supported by the evidence, is without foundation or merit.

Consequently, the Board finds that the appellant has failed to come forth with any evidence to support the aforementioned contentions. Accordingly, the Order of August 5, 1974, should be affirmed and the appeal dismissed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Order of the Administrative Law Judge issued August 5, 1974, in the estate herein be, and the same is HEREBY AFFIRMED and the appeal herein is DISMISSED.

This decision is final for the Department.

Mitchell J. Sabagh
Administrative Judge

We concur:

David J. McKee
Chief Administrative Judge

Alexander H. Wilson
Administrative Judge